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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

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No. 193

NEMOURS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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Dated: July 18, 1951.

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner, Nemours Corporation, prays that a writ of certiorari may issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 19, 1951. Said judgment, based upon an opinion of said Court, in which one judge dissented, reversed a judgment of the United States District Court for the District of Delaware, which ordered the payment to the petitioner of $37,206.55, plus interest as provided by law, representing an overpayment of undistributed profits tax paid by petitioner for the taxable year 1936, as determined under §501 of the Revenue Act of 1942.

Jurisdiction.

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code.

Opinions Below.

The opinion of the District Court is reported in *Nemours Corp.* v. *United States,* 91 F. Supp. 859, and is printed in the Appendix (*infra*), pages 1a to 10a. The opinion of the United States Court of Appeals is printed in the Appendix, pages 11a to 18a.

Statute Involved.

The statute involved is §501 of the Revenue Act of 1942, which is set out in the Appendix, page 19a.

Questions Presented.

1. Are the earnings and profits of a corporation which have been duly capitalized under State law and stock issued therefor, to be treated as capital in determining liability for the undistributed profits tax imposed by §14 of the Revenue Act of 1936, as amended by §501 of the Revenue Act of 1942?

2. Can moneys which have once been paid out by a corporation for business expenses, be held to be a part of earnings and profits, expendable again as a dividend, because the corporation failed to claim a deduction therefor in its income tax return?

3. Does a refund claim which specifically states that it is filed under §501 of the Revenue Act of 1942, the detailed

figures of which definitely show that a credit is claimed, as therein provided, because of the lack of earnings and profits with which to pay a dividend, permit the recovery of an overpayment of tax, as provided by said section?

The Facts.

The petitioner is a corporation organized under the laws of the State of Delaware. During the years 1925-1928, inclusive, it made money. During this period $2,228,100 of its earnings and profits were transferred to its capital account and dividends in the form of stock were issued to its stockholders as provided by Delaware law. During the years 1933 and 1934 petitioner sustained substantial losses. If the $2,228,100 of earnings which were capitalized are to be treated as capital, petitioner had no accumulated earnings and profits on December 31, 1935, instead, it had a deficit of $1,726,632.07. If the earnings and profits so capitalized are not to be treated as capital, petitioner had earnings and profits on said date of $501,467.93.

Petitioner's statutory net income for the year 1936 was $362,650.01. This reflects the disallowance of a loss of $235,513.63 sustained from the sale of securities, because of the provisions of the statute limiting the deduction for such losses to $2,000.00.

Petitioner's undistributed net income of $231,175.29, upon which the undistributed profits tax of $39,044.24 was computed and paid, was arrived at by substracting from the computed net income of $362,650.01, the normal tax thereon of $3,064.12, plus the amount of dividends paid during the year, namely, $128,410.60.

In 1936 petitioner expended $10,371.05 for repairs, painting and insurance on real estate owned by it and the depreci-

ation thereon was $4,706.58, a total of $15,077.63, which was not deducted by petitioner in its return for said year. The District Court held that said $15,077.63 was not available as earnings and profits of the year 1936 for distribution as a dividend. The Circuit Court held that said amount was available for dividend distribution.

A claim for the refund of a portion of the undistributed profits tax paid by petitioner was filed with the Collector of Internal Revenue for the District of Delaware. The claim stated that it was filed under §501 of the Revenue Act of 1942, and the supporting computations show that a credit was claimed for the reason that petitioner's earnings and profits were not sufficient to pay a dividend equal to its undistributed net income as computed under the statute. This claim was disallowed. Suit was brought in the United States District Court for the District of Delaware. The District Court entered judgment for the petitioner. The United States Court of Appeals for the Third Circuit reversed the judgment of the District Court.

Reasons for Granting the Writ.

The decision of the Circuit Court is believed to be erroneous in three respects:

1. It is believed to be in direct conflict with the decision of this Court in *United States* v. *Ogilvie Hardware Company, Inc.*, 330 U. S. 709, in that it fails to follow the majority opinion of the Court, and accepts as the basis for its conclusion the reasoning employed in the dissenting opinion of Mr. Justice Frankfurter in that case.

2. It fails to recognize a simple rule of economics that moneys paid out as an ordinary and necessary business

expense, for repairs, painting and insurance, cannot again be available as earnings and profits for distribution as a dividend.

3. It fails to realize that a refund claim which specifically states that it is filed under a special retroactive relief statute and gives all of the information necessary for the allowance of the relief provided by such a statute, is a sufficient and adequate compliance with such a statute.

BRIEF AND ARGUMENT.

POINT I.

The decision of the Circuit Court is in conflict with the decision of this court in *United States* v. *Ogilvie Hardware Company, Inc.*, 330 U. S. 709.

Section 14 of the Revenue Act of 1936, for the first time in the history of Federal tax administration imposed a simon pure undistributed profits tax. Its purpose was to compel corporations to distribute their earnings so as to permit the collection of a tax thereon from the stockholders.

The inequities and harsh consequence of the law resulted in its repeal after an effective period of two years, namely, 1936 and 1937. However, the severe economic effects of the law for the two-year period became of such concern that in 1942 Congress passed remedial retroactive relief legislation. This relief was provided in §501 of the Revenue Act of 1942 (Appendix, pp. 19a-20a).

This section amended §14(a)(2) of the Revenue Act of 1936, in the definition of undistributed net income, the measure of the tax, by providing for the deduction of additional credits which were added by amendments to §26 of the 1936 Act.

Many claims for refund were filed under this section and many of such claims have been tenaciously resisted by the Government. The first litigated case to reach this Court, involving such a claim, was *United States* v. *Ogilvie Hardware Company, Inc.*, 330 U. S. 709, 67 S. Ct. 997. The majority opinion, by Mr. Justice Black, gives an excellent discussion of the purposes and accomplishments of the legislation. It describes said §501 as an "extraordinary relief measure" and it stated that the section was to be applied without regard to "tax definitions" and that refunds thereunder were not to be restricted by the application of established "tax terminology."

The opinion makes it clear that the question of whether a corporation has accumulated earnings and profits which can be distributed as dividends, so as to avoid the impact of the undistributed profits tax, must be determined under the laws of the state under which the corporation is organized.

The opinion of the District Court recognized and followed this rule. The Circuit Court in its opinion does not mention the rule. In fact, the opinion of the Circuit Court avoids a discussion of the real legal question involved by seeking to discredit and to find as insufficient the claim for refund that was filed.

The fact remains, as the District Court holds in its opinion, that under §14 of the General Corporation Law of the State of Delaware, the amount which petitioner could pay as a dividend was limited, and the judgment of the District Court was entered in accordance with the limitations so fixed, in accordance with the decision of this Court in *United States* v. *Ogilvie Hardware Company, Inc., supra.*

On the facts the instant case cannot be distinguished from those existing in *United States* v. *Ogilvie Hardware Company, Inc., supra.*

POINT II.

Funds once used are not available for dividend distribution.

The stipulated facts are that petitioner expended, in 1936, $10,371.05 for insurance, repairs and painting of property owned by it, and charged on its books $4,706.58 for depreciation of such properties. Neither of these items were deducted by the petitioner in its Federal income tax return for the year 1936. Furthermore, the stipulated facts show that such items were not deducted in computing petitioner's earnings and profits for the year 1936 as determined by the Government.

Certainly the $10,371.05 which was paid out for insurance, repairs and painting could not again be used to pay a dividend. Furthermore, no rule of law or economics has yet announced that a reserve set up for depreciation represents earnings and profits available for dividend distribution.

The total disregard of these basic and elemental facts indicates a state of confusion on the part of the Circuit Court when it held, with one dissenting opinion, that in computing the earnings and profits of the year 1936, such items are to be considered as earnings and profits that could be used to pay dividends. No other plausible explanation of such a holding is apparent or conceivable. The fact that such items were not claimed in petitioner's return is immaterial and has no bearing whatever on the issue.

POINT III.

The refund claim was sufficient in all respects.

The refund claim clearly shows that it was filed under §501 of the Revenue Act of 1942 and that petitioner's earnings and profits for the year 1936, plus its accumulated earnings and profits for prior years, which could be used to pay dividends, were not sufficient to pay a dividend in an amount equal to its computed undistributed net income, and accordingly, a credit for a portion of the difference was claimed, which permitted a refund of a portion of the undistributed profits tax theretofore assessed and paid.

When the audit of this refund claim was completed by the Commissioner of Internal Revenue, the figures arrived at by him were materially different from those shown in the claim, both as to earnings and profits for the year 1936, and the accumulated earnings and profits as at the beginning of such year.

Notwithstanding such adjustments, the fact remained that under the decision of this Court in the Ogilvie Hardware Company, Inc., case, the petitioner had made an overpayment of tax and was entitled to a refund and for that reason this suit was brought.

The Government contended and the Circuit Court agreed that because §26(f) is referred to in one of the mathematical computations attached to the claim, that the claim must be considered as having been made under §26(f). However, whether or not the reference to §26(f) was an oversight or an error in typing, the fact remains that the computation of the credit as made in the claim was in strict accordance and compliance with the credit provided in §26(c), as added by said §501.

The District Court correctly found that all the facts were available in the refund claim and that the claim was sufficient to permit the recovery under §26(c). It pointed out that the burden placed on the Commissioner of Internal Revenue, in recognizing it as such, was, at most, a very trivial one.

The conclusion of the District Court was the fair and judicial one that a taxpayer has the right to expect from his Government. The decision of the Circuit Court is neither fair nor reasonable. *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293, relied upon by the Circuit Court has no factual resemblance to the instant case. In the *Angelus Milling Co.* case this Court said, "Even tax administration does not as a matter of principle preclude considerations of fairness."

Petitioner feels that its claim for refund was sufficient, as the District Court held, and that under the decisions of this Court in *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 53 S. Ct. 278; *United States* v. *Factors & Finance Company,* 288 U. S. 89, 53 S. Ct. 287 and *Bemis Bros. Bag Co.* v. *United States,* 289 U. S. 28, 53 S. Ct. 454, the Circuit Court erred when it arrived at a contrary conclusion.

Therefore the petition for writ of certiorari should be granted.

Respectfully submitted,

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20 Exchange Place,
New York 5, N. Y.

Dated: July 18, 1951.

Appendix.

In the District Court of the United States

FOR THE DISTRICT OF DELAWARE.

NEMOURS CORPORATION, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

FINDINGS AND OPINION OF DISTRICT COURT.

This action is for recovery of undistributed profits tax paid by plaintiff for the calendar year 1936. It is here on cross motions for summary judgment. A stipulation[1] was filed from which the following facts have, in substance, been found.

1. Plaintiff, Nemours Corporation, is a Delaware corporation organized in 1924. It is a personal holding company as defined by the applicable Federal Revenue Acts, holding investments in securities, real estate and oil and gas properties. During the taxable year involved, its total outstanding stock consisted of 36,172 no par value shares, of which 28,923 shares were held by Paulina duPont Dean and 7,249 by her husband, J. Simpson Dean. During 1936 the directors were Paulina duPont Dean, J. Simpson Dean and S. Hallock duPont. The charter of the corporation was amended in December, 1925, increasing the authorized common stock from 10,000 shares of no par value to 20,000 shares of no par value. A further amendment in December, 1927, increased the common stock from 20,000 shares of no par value to 50,000 shares of no par value.

[1] All exhibits attached to the stipulation are in evidence and have been considered as a part of the record.

2. On May 7, 1943, plaintiff filed, with the Collector of Internal Revenue for the District of Delaware, a claim for refund of undistributed profits tax paid for the calendar year 1936. Plaintiff was advised by letter dated August 18, 1945, that said claim for refund was disallowed in full. This suit was brought within two years from that date.

3. On March 15, 1937, plaintiff filed with the Collector of Internal Revenue for the District of Delaware, its income tax return for the calendar year 1936, prepared on a cash basis. The following tax liability of $41,904.48 shown by the return was paid to the Collector:

March 17, 1937	$10,476.12
June 15, 1937	10,476.12
September 15, 1937	10,476.12
December 15, 1937	10,476.12

Thereafter, as a result of audit, the Commissioner of Internal Revenue determined plaintiff's federal income tax liability for the calendar year 1936 was the following:

Normal tax	$ 3,064.12
Undistributed profits tax	39,044.24
Total	$42,108.36

This finding of tax liability was based upon the determination by the Commissioner that the plaintiff's net income, as shown by the return filed in the amount of $361,988.82, should be increased to $362,650.01, a difference of $661.19. This was because of certain adjustments not here material. After deducting from the $362,650.01 figure, the normal income tax thereon of $3,064.12, as well as the credit for dividends paid during the year, namely $128,410.60, it was held that plaintiff's undistributed net income was $231,175.29 and that the undistributed profits tax due thereon was $39,044.24.

4. The difference between plaintiff's total tax liability for the year of $42,108.36, as determined by the Commissioner, and the $41,904.48 paid as later noted, or $203.88, was duly paid by the plaintiff. In the year 1936, plaintiff sold for a total of $434,753.77 certain securities which had cost it $672,267.40. A loss of $237,513.63 was thereby sustained.

5. Although this loss reduced plaintiff's earnings and profits, in the determination of plaintiff's net income subject to normal tax as well as its undistributed net income subject to undistributed profits tax, plaintiff was permitted, by the effective Revenue Act, to claim as a deduction only $2,000.00 of this loss of $237,513.63. Plaintiff's earnings and profits for the taxable year 1936, without considering the matters contained in the next paragraph, which plaintiff contends should decrease such earnings and profits, were $133,263.45.

6. Plaintiff also claims that as of the end of 1936, there should be a further deduction from the earnings and profits of that year of $15,077.63, which it describes as "real estate repairs, insurance and depreciation". Plaintiff did not claim and was not allowed this deduction in computing its taxable income for 1936. Title to the real estate involved was transferred to plaintiff by plaintiff's principal stockholder (Paulina duPont Dean) in 1931 as the result of a request by the the Chase National Bank of New York, for the purpose of improving the credit position of plaintiff, which was at that time indebted to the bank in the sum of $600,000. The real estate was a residential property occupied without payment of any rental at all times from at least 1931 to the present by J. Simpson Dean and his wife, Paulina duPont Dean, who, as stated, were the sole stockholders of plaintiff. The property was never used by the corporation for business purposes and it was never intended that it should be. Legal title to the property was later transferred back to Mrs. Dean on September 30, 1947.

The $15,077.63, which was not deducted by plaintiff in computing its income subject to either the normal tax or the undistributed profits tax for the taxable year 1936, is made up of the following:

Actual expenditures:

Insurance	$ 4,594.20
Redecorating interior first floor, halls, stairs and entrance	3,784.50
Miscellaneous repairs and materials	462.05
Painting exterior of buildings and bridges	1,530.30
Subtotal	$10,371.05
Estimated allowance for depreciation	4,706.58
Total	$15,077.63

The taxpayer was not required to make any of the foregoing expenditures but did so at the request of its two stockholders.

7. Plaintiff's paid in capital at the time of its organization in 1924 was $962,924.19. Plaintiff's operations during the years 1925, 1926, 1927 and 1928 were profitable. During such years it declared and paid stock dividends, and recorded such transactions on its books of account by transfers from its surplus account to its capital account of the following amounts:

Year 1925	$ 150,000
Year 1926	402,500
Year 1927	679,600
Year 1928	996,000
	$2,228,100

8. Plaintiff sustained substantial losses in the years 1933 and 1934. On December 31, 1935, its accumulated earnings and profits amounted to $501,467.93 if the stock dividends

referred to in the preceding paragraph are held not to have reduced its earnings and profits; but if such stock dividends are effective to reduce earnings and profits, it had no accumulated earnings and profits but instead a deficit in the sum of $1,726,632.07.

9. The balance sheet which appears on plaintiff's income tax return as of December 31, 1935, was obtained from the plaintiff's books and is based *solely on cost* and not market value and is not adjusted by any corrections made by the Commissioner. Plaintiff's net profits for its taxable year 1935 were $138,880.65. Against this income the Commissioner assessed personal holding company surtax under §351 of the Revenue Act of 1934 in the sum of $19,207.60, which plaintiff paid. No other federal income taxes were due. The amounts declared and paid by plaintiff as dividends during this year totaled $83,195.60.

10. In determining plaintiff's net profit for 1936, plaintiff contends that the $133,263.45 referred to in paragraph 5, supra, should be decreased by the following deductions:

(a) The matters referred to in paragraph 6, supra, entitled "real estate repairs, insurance and depreciation;" and

(b) The federal tax liability of the plaintiff for 1935, referred to in paragraph 3, supra, which was actually paid subsequent to 1936.

LEAHY, Chief Judge.

If it is determined the taxpayer is entitled to any credit against the undistributed profits surtax paid, the parties agree they will compute the effect of such credit upon the plaintiff's undistributed profits surtax in order to arrive at the precise amount of any judgment which may be rendered.[1a]

[1a] The complaint claims $30,385.87 with interest. This is, however, a token claim, as the stipulation on the amount to be received by plaintiff is controlled by the stipulation.

The facts raise three questions: (1) Was the claim for refund filed under §26(f) of the Revenue Act of 1936 sufficient to entitle taxpayer to a refund under §26(c)(3) if it is otherwise entitled to a refund under §26(c)(3)? (2) Is the taxpayer in any event entitled to a credit under §26(c)(3) of the Revenue Act of 1936? (3) If the taxpayer is entitled to relief under §26(c)(3), whether it may receive the benefit of certain payments not claimed as deductions when the 1936 income tax return was filed. These questions will be considered in order, but first a statement will be made more fully discussing the arguments and apposite statements relating to the second issue.

As the stipulation on the facts shows, plaintiff, for the years 1925-28 made money, and during such years declared and paid stock dividends. It recorded such transactions on its books by transferring from its surplus account to its capital account a sum in excess of $2,000,000. Plaintiff sustained substantial losses in the years 1933-34. On the critical date, December 31, 1935, the accumulated earnings and profits amounted to $501,467.93 if the stock dividends did not reduce its earnings and profits. But if such stock dividends are effective to reduce its earnings and profits, it had no accumulated earnings and profits but instead a deficit in the sum of $1,726,632.07, and with the exception of minor deductions, plaintiff would be entitled to the refund here sought.

The purpose of the 1942 amendment (c. 619, 56 Stat. 798, §501) was to relieve corporations which in 1936 were "caught in a trap". In short, many companies found their financial condition to be such that they were prohibited under the law of the state of their incorporation from paying dividends and yet required under the terms of the Revenue Act of 1936 (49 Stat. 1648, §§14, 26, 27) to pay dividends or be taxable for their non-payment. Plaintiff argues that under §14 of the Delaware Corporation Law (Revised Code of Delaware 1915, §1928, c. 65, §14; Laws of Delaware 1925, Vol. 35, c. 85, §8) its earnings for the years 1925-28 were duly transferred to its capital account and became a part

of plaintiff's capital and were not available for distribution as earnings and profits in 1936, and that under §34 of the Delaware Corporation Law (Revised Code of Delaware 1935, §2066, c. 65, §34; Laws of Delaware 1929, Vol. 36, c. 135, §16) plaintiff could pay dividends in 1936 on its stock only out of (a) its net assets in excess of its capital, or (b) if there be no excess, out of its net profits for the year 1936 plus any net profits for the year 1935 that were not distributed by plaintiff in 1935. Since the facts show that plaintiff's capital exceeded its assets in 1936, plaintiff could pay dividends in 1936 only out of its net profits for that year plus any remaining undistributed profits for the year 1935.

I think it is unnecessary to quote the sections of the Delaware Corporation Law already referred to because not only has plaintiff correctly interpreted them but defendant does not dispute the interpretation. Defendant, while not disputing plaintiff's interpretation of those sections of the Delaware Corporation Law, argues, however, that it could have reversed its practice of the years 1925-28 and in 1936 reduced its capital under §28 of the Delaware Corporation Law (Revised Code of Delaware 1935, §2061, c. 65, §29; Laws of Delaware 1929, Vol. 36, c. 135, §15); and since it had this right—a right which does not require approval of the state—and did not exercise it, it was not "caught in a trap" and is not entitled to the relief provisions of §501 of the Revenue Act of 1942.

I think the form of the claim for refund is sufficient to entitle plaintiff to relief. It is true that in terms the credit or refund was claimed under an erroneous section, i.e., that the claim for refund is based on §26(f) of the Revenue Act of 1936, as added by §501(a)(3) of the Revenue Act of 1942,[2] whereas it should have been filed under

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[2] This section provides as follows:

(f) *Deficit Credit.*—The amount by which the adjusted net income exceeds the sum of (1) the earnings and profits accumulated after February 28, 1913, as of the beginning of the taxable year, and (2) the earnings and profits of the

§26(c)(3) of the same Act.[3] It is further true that under regulations of the Treasury Department, which it is authorized to make, the claims for refund must fairly apprise a Commissioner of the grounds and circumstances surrounding the claim for refund. I am not unmindful that the Court in Angelus Milling Co. *v.* Commissioner, 325 U. S. 293, 299, in connection with this problem, said: "* * * but it is not enough that somewhere under the Commissioner's roof is the information which might enable him to pass on a claim for refund." I think, however, it is possible to agree with the Court's statement and still think the form of the claim for refund in the case at bar is sufficient. Here, the claim is made for relief under the provisions of §501 of the Revenue Act of 1942; all the facts are available in the refund claim. That one section of the Act was mentioned rather than another seems unimportant if the basic issue is predicated on the conclusion that the refund should be

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taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year). For the purposes of this subsection, earnings and profits of the taxable year shall be computed without diminution by the amount of the tax imposed under section 14, 102, 103, or 351 for such taxable year; and earnings and profits accumulated after February 28, 1913, as of the beginning of the taxable year, shall be diminished on account of the tax under section 14, 102, 103, or 351 for any previous taxable year only by the amount of such tax as computed under the amendments made by section 501 of the Revenue Act of 1942.

[3] This section provides as follows:

(c) *Restrictions on Payment of Dividends.*

* * * *

(3) *Deficit corporations.*—In the case of a corporation having a deficit in accumulated earnings and profits as of the close of the preceding taxable year, the amount of such deficit, if the corporation is prohibited by a provision of a law or of an order of a public regulatory body from paying dividends during the existence of a deficit, in accumulated earnings and profits, and if such provision was in effect prior to May 1, 1936.

allowed. The additional burden—if such there was—imposed on the Commissioner seems, at most, a very trivial one.

Plaintiff, under authority of Ogilvie Hardware Co. *v.* United States, 330 U. S. 709, and United States *v.* Byron Sash and Door Co., 6 Cir., 150 F. 2d 44, is entitled to relief unless precluded by its failure to exercise its rights to reduce capital under §28 of the Delaware Corporation Law. In the last case above, which involved a Kentucky corporation, the factual situation was comparable to that here. In that case, as here, there would have been no deficit in earnings and profits on December 31, 1935, if plaintiff had not distributed stock dividends in prior years. In that case, as here, there were subsequent operating losses. Nevertheless, the Court held that the corporation was entitled to tax relief. Under the Kentucky law, however, unlike the Delaware law, there was nothing the corporation could have done to have avoided the tax in 1936. There was no provision comparable to §28 of the Delaware Corporation Law. The issue here, then, is a narrow one, viz., does the existence of §28 of the Delaware Corporation Law preclude the plaintiff from his refund? I conclude not.

The arguments that plaintiff can not claim the refund unless it reduced its capital under §28 of the Delaware Corporation Law do not persuade me. I find nothing in the Revenue Act of 1942 enforcing the conclusion that the Court must consider not only the actual situation but also the situation as it might have been. I think the Revenue Act of 1942 dealt only with an actual situation and did not make it obligatory on corporations to change their capital structures in order to qualify under the Act. Alteration of capital structure is an act of independent legal significance. There may be many reasons ex tax considerations why a company would not wish to change its capital structure. Since the remedial Act dealt with the actual condition and since the capital of plaintiff company was not, in fact, reduced, it is entitled to a refund. United States *v.* Byron Sash and Door Co., 6. Cir., 150 F. 2d 44.

There were items of minor deductions. These are certain items of depreciation and expense of the property of plaintiff not claimed as deductions when the return was filed in 1936. The argument of the defendant is that since they were not claimed as deductions at the time the return was filed, they are not deductible now. The plaintiff simply takes the opposite position. I think clearly these items may be considered in connection with the relief provisions of the Revenue Act of 1942. It would be pure fiction to say that such deductions were earnings and available as dividends. Whether the deductions were claimed is irrelevant. The plain fact is that the money has been spent and obviously is not available for any purpose.

In accordance with the last paragraph of the stipulation, I am simply making a finding in favor of plaintiff, and the amounts may be arrived at when the order is settled.

Dated: April 12, 1950.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 10,343.

NEMOURS CORPORATION,

v.

UNITED STATES OF AMERICA,

Appellant.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Argued March 20, 1951

Before GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges*

OPINION OF THE COURT.

(Filed April 19, 1951.)

By GOODRICH, *Circuit Judge.*

This case involves the application of the 1942 tax statute upon an application for refund brought by the taxpayer to get back undistributed profits surtaxes paid by it for the taxable year 1936. The taxpayer's claim for refund was refused by the Commissioner and it successfully sued for the amount claimed in the District Court of Delaware.[1] The Government appeals. The factual questions are all settled by a stipulation between the parties.

[1] *Nemours Corp.* v. *United States*, 91 F. Supp. 859 (D. C., Del. 1950).

The taxpayer has been, since its incorporation in 1924, a personal holding company. During the years 1925-1928, inclusive, it made money and distributed non-taxable stock dividends of something more than $2,000,000. These distributions were reflected on taxpayer's books by an entry which transferred that amount from the company's surplus to its capital account. During 1933 and 1934 this taxpayer, like many others, sustained substantial losses. If stock dividends are deemed to have reduced the taxpayer's accumulated earnings and profits, it had none as of December 31, 1935, but had, instead, a deficit of more than $1,700,000. If the stock dividends are not to be taken to have reduced its accumulated earnings and profits it had about $500,000 in earnings and profits as of the date mentioned. The manner in which the amount represented by these stock dividends is to be treated will largely determine the result of the case.

The undistributed profits tax was imposed by Section 14 of the Revenue Act of 1936. That it raised some hard problems for courts is a matter of common knowledge to members of the federal judiciary since that time. That it created some hard situations for taxpayers was evidently the view of Congress. In 1938 the statute was repealed. In the Revenue Act of 1942 Congress made provision for refunds in certain cases and, in addition, made the refund provision retroactive and gave other relief with regard to the bar of the statute of limitations.

The taxpayer sought to avail itself of the legislative help thus given. On May 7, 1943, it filed its claim for refund under that portion of Section 501 of the 1942 Act which added Section 26(f) to the Revenue Act of 1936.[2] The claim

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[2] "[26](f) *Deficit credit.* The amount by which the adjusted net income exceeds the sum of (1) the earnings and profits accumulated after February 28, 1913, as of the beginning of the taxable year, and (2) the earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year). * * *" Rev. Act of 1936, 49 Stat. 1648, as amended in Rev. Act of 1942, §501(a), 56 Stat. 798.

states that it is filed under Section 501 of the Revenue Act of 1942 and in an attached statement claims a "'deficit credit,' Section 26(f) as added by Section 501 Revenue Act of 1942."

After the taxpayer's claim for refund had been filed and after the Commissioner had rejected it, and also after the statutory period available to taxpayer for filing refund claims had passed, the Supreme Court decided the case of United States *v.* Ogilvie Hardware Co., Inc., 330 U.S. 695 (1947). That decision gave aid and encouragement to taxpayers under Section 26(c)(3) of the same statute.[3] It encouraged, among others, this taxpayer who raised, for the first time in the District Court, the applicability of Section 26(c)(3) to its financial situation in 1936. For the first time the provisions of this Section, which it will be noted are quite different from that of Section 26(f), were included by the taxpayer in its demand for refund, over government objection. The District Court thought that the taxpayer had not presented a claim for refund good under Section 26(f), but concluded in view of the Ogilvie decision that it had a good claim under Section 26(c)(3) and gave judgment accordingly. The court said that it seemed unimportant that one Section of the Act was mentioned rather than another and that "the additional burden—if such there was—imposed on the Commissioner seems at most a very trivial one."

We, therefore, have two questions. The first is whether the taxpayer has set out a claim on which it is entitled to refund under Section 26(f) of the statute. The second question is whether if there is to be no recovery under Section 26(f) there can be recovery under Section 26(c)(3).

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[3] "[26(c)](3) *Deficit corporations.* In the case of a corporation having a deficit in accumulated earnings and profits as of the close of the preceding taxable year, the amount of such deficit, if the corporation is prohibited by a provision of a law or of an order of a public regulatory body from paying dividends during the existence of a deficit in accumulated earnings and profits, and if such provision was in effect prior to May 1, 1936." Rev. Act of 1936, 49 Stat. 1648, as amended in Rev. Act of 1942, §501(a), 56 Stat. 798.

The court below gave little discussion to the first question because, as above indicated, it thought there could be recovery under Section 26(c)(3). We think the taxpayer is not entitled to prevail under Section 26(f) upon which the original claim for refund was made.

The question is whether in computing "earnings and profits accumulated after February 28, 1913" under Section 26(f) the amounts transferred to capital upon issuance of the non-taxable stock dividends are to be included. The phrase "earnings and profits" has come to have an established meaning under federal tax law, and according to that meaning amounts of profits transferred to capital upon issuance of non-taxable stock dividends remain part of earnings and profits for tax purpose.[4] We see no reason to believe that Congress intended to give the phrase any other meaning in Section 26(f).

United States *v.* Ogilvie Hardware Co., 330 U. S. 709 (1947), is not an authority to the contrary. There the Court held that "accumulated earnings and profits" in Section 26(c)(3) of the Revenue Act of 1936, also added by Section 501(a) of the Revenue Act of 1942, was used in the state law sense and not in the usual federal tax sense. The Court there dealt with a limited hardship situation. Many corporations, because of an accumulated deficit in surplus, were prevented by state law from declaring dividends, yet were required to pay an undistributed profits tax under the 1936 Act. Section 26(c)(3) was passed to give relief in this situation. The Court reasoned that since reference was to be had under Section 26(c)(3) to state law to determine whether the corporation could legally declare dividends, reference must also be made to that law rather than to federal tax law to determine when the corporation had a "deficit in accumulated earnings."

The Ogilvie case does not by any means govern the interpretation of Section 26(f). It is true that Sections

[4] See Int. Rev. Code §115(a) and (h); Comm'r. *v.* Wheeler, 324 U. S. 542, 546 (1945); United States *v.* Ogilvie Hardware Co., 330 U. S. 709, 714, 722 (1947).

26(c)(3) and 26(f) of the Revenue Act of 1936 were both special relief provisions added by Section 501 of the Revenue Act of 1942, and both provided retroactive relief from inequities which resulted from the undistributed profits tax of 1936. But there the similarity ends. Section 26(c)(3) was intended to permit the refunding of taxes imposed upon a corporation for not distributing profits which the corporation was prohibited by law from distributing. Section 26(f) was intended to permit refunding of undistributed profits taxes paid when the corporation could not have avoided the tax even if it had distributed the profits.[5]

The principal evil to be remedied by Section 26(f) was that resulting from the inconsistent treatment of capital losses in computing the corporate net income and in determining allowable credits against that income for undistributed profits tax purposes. This produced a result, taxwise, which Congress undoubtedly never intended. But the thing which produced it was federal tax law entirely. And in remedying the situation by 26(f) Congress used language with long-standing federal tax meaning. A refund or credit under 26(f) does not depend in any way upon state law. We conclude that the phrase "earnings and profits" in 26(f) is used in its ordinary tax sense. Taxpayer therefore is entitled to no refund on the basis of that Section.

This brings us to the second question. May taxpayer, having lost out under Section 26(f), nevertheless recover under Section 26(c)(3)? It may well be that all of the facts about this corporation relevant to a refund under the statute are contained in the disclosure made by the taxpayer's claim for refund. It is easy and natural, therefore, to argue that if the Commissioner is in possession of all the facts it is no hardship on him to skip from section to section of the same statute to see if the facts set out a valid claim for the taxpayer under any section, however differing in theory the sections may be. It is not too much, one might argue, to ask the Commissioner to know the various sections of the Revenue law, the administration of which is his daily business.

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[5] Sen. Rep. No. 1631, 77th Cong. 2d Sess. 244 (1942).

Furthermore, this argument has many analogies to support it. We think it likely that nowhere does the plaintiff now lose a lawsuit if he chooses the wrong writ and brings his action in trespass instead of case. Certainly the Federal Rules of Civil Procedure allow the widest latitude in letting a plaintiff present his facts and not be hampered by the imposition of forms of action or theory of pleading. We have recently held that where the facts in two actions were the same, the termination of one operated as *res judicata,* although in the other the plaintiff alleged a different theory as a ground for recovery. Williamson *v.* Columbia Gas and Electric Corp., 186 F. 2d 464 (3rd Cir. 1950). So, here, the conclusion that one has put in a claim if he has put in his facts is not only a plausible one, but one having strong elements of equity in it.

We think it a fair statement, however, that courts are not invited to import equitable considerations into tax cases. See the fate of Electric Storage Battery Co. *v.* Rothensies, 152 F. 2d 521 (3rd Cir. 1945), when it became Rothensies *v.* Electric Storage Battery Co., 329 U. S. 296 (1946). See, also, United States *v.* Lewis, U. S. Sup. Ct., March 26, 1951.

A long-standing statutory provision with regard to tax refunds is that suits may be brought only after a claim for refund has been filed with the Commissioner in accordance with the law and Treasury Regulations.[6] The Regulations governing refunds under the statute in question here provide that "The claim must set forth in detail * * * each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof." Treas. Regs. 94, Art. 322-3 (1936).[7] It is to be noted that both the grounds for recovery and the facts supporting them must be shown. The taxpayer stated as its ground

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[6] Rev. Stat. §3226, as amended in §1103(a) of the Revenue Act of 1936, 47 Stat. 286. See Internal Revenue Code §3772.

[7] The present Regulations are to the same effect. Treas. Regs. 111, Sec. 29.322-3.

for refund Section 26(f) and made its computation accordingly. That does not, under the decisions, give him a right to claim under some other section. See especially Real Estate-Land Title & Trust Co. *v.* United States, 309 U. S. 13 (1940); A. M. Campau Realty Co. *v.* United States, 69 F. Supp. 133 (Ct. Cl. 1947).

This is hard law, no doubt. Perhaps it is necessarily strict law in view of the scope of the operations of a fiscal system as large as that of the United States. Whether that is so we are not called upon to say. We apply the rule; we do not make it. It is to be observed that recovery of claims against the Government has always been the subject of a strict compliance requirement. The recovery of claims for tax refunds is but an application of this broad and strict rule.[8]

We do not consider, because not required to, whether the taxpayer's claim under Section 26(c)(3) could be upheld under the Ogilvie case cited above. It comes close to it, but recovery here would require an extension of that case. Whether that extension should be made is a question we do not reach.

There was a point before the District Court about a deduction for expenses in maintenance and repair of a house standing in the name of the taxpayer and occupied by its president. It is obviously true that if this was an expense of the corporation it reduced its net income and, therefore, cut down any tax the corporation would have had to pay for a given taxable year whether ordinary income tax, excess profits tax or undistributed profits tax. But if the corporation did not claim its deduction either when it filed its return or within the period allowed for the amendment of the return we do not see how the fact that it may have had an unclaimed deduction can come into litigation

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[8] See *e.g.*, Angelus Milling Co. *v.* Comm'r., 144 F. 2d 469, 472 (2d Cir. 1944), aff'd 325 U. S. 293 (1945); Maas & Waldstein Co. *v.* United States, 283 U. S. 583, 589 (1931); Rock Island, Arkansas & L. R. Co. *v.* United States, 254 U. S. 141, 143 (1920); Nichols *v.* United States, 7 Wall. 122, 126 (U. S. 1868).

now. The taxpayer cannot recover under Section 26(f) because as shown above we do not think he has made out a claim. He cannot get a refund under Section 26(c)(3) because he did not state that Section as a ground when he filed his refund claim. Since he cannot get a refund under either provision the matter of whether the house repairs were a proper deduction has become history which cannot be changed.

The judgment of the District Court will be reversed.

McLaughlin, Circuit Judge, dissents for the reasons expressed in the opinion of the Court below, 91 F. Supp. 859.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Section 501—Revenue Act of 1942, c. 619, 56 Stat. 798.

SEC. 501. ADDITIONAL CREDITS FOR UNDISTRIBUTED PROFITS TAX.

(a) AMENDMENTS TO THE REVENUE ACT OF 1936.—

(1) Section 14 (a)(2) of the Revenue Act of 1936 (relating to definition of undistributed net income) is amended to read as follows:

"(2) The term 'undistributed net income' means the adjusted net income minus the sum of (A) the dividend paid credit provided in section 27, (B) the credit provided in section 26 (c) relating to restrictions on payment of dividends, (C) except in cases where section 26 (c)(1) is applicable, the deficit credit provided in section 26 (f), and (D) the redemption credit provided in section 26(g)."

(2) Section 26 (c) of the Revenue Act of 1936 (relating to credits of corporations) is amended by amending the heading to read as follows: "(C) RESTRICTIONS ON PAYMENT OF DIVIDENDS.—"; and by amending paragraph (3) to read as follows:

"(3) DEFICIT CORPORATIONS.—In the case of a corporation having a deficit in accumulated earnings and profits as of the close of the preceding taxable year, the amount of such deficit if the corporation is prohibited by a provision of a law or of an order of a public regulatory body from paying dividends during the existence of a deficit in accumulated earnings and profits, and if such provision was in effect prior to May 1, 1936.

"(4) DOUBLE CREDIT NOT ALLOWED.—If more than one of the credits provided in the foregoing paragraphs (1), (2), and (3) apply, then the paragraph which allows the greatest credit shall be applied; and, if the credit allowable under each paragraph is the same, only one of such paragraphs shall be applied."

(3) Section 26 of the Revenue Act of 1936 (relating to credits of corporations) is amended by adding at the end thereof the following new subsections:

"(f) DEFICIT CREDIT.—The amount by which the adjusted net income exceeds the sum of (1) the earnings and profits accumulated after February 28, 1913, as of the beginning of the taxable year, and (2) the earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year). For the purposes of this subsection, earnings and profits of the taxable year shall be computed without diminution by the amount of the tax imposed under section 14, 102, 103, or 351 for such taxable year; and earnings and profits accumulated after February 28, 1913, as of the beginning of the taxable year, shall be diminished on account of the tax under section 14, 102, 103, or 351 for any previous taxable year only by the amount of such tax as computed under the amendments made by section 501 of the Revenue Act of 1942.

"(g) STOCK REDEMPTION CREDIT.—An amount equal to the portion of the recognized gain, realized within the taxable year and prior to March 3, 1936, from the sale or other disposition of a capital asset, which pursuant to a contract, was distributed prior to such date to shareholders in redemption in whole or in part of preferred stock and which is not otherwise allowable as a credit under any other provision of this section or section 27."

(b) EFFECTIVE DATE OF AMENDMENTS.—The amendments made by subsection (a) shall be effective as of the date of the enactment of the Revenue Act of 1936.

(c) OVERPAYMENTS.—If the refund or credit of any overpayment for any taxable year, to the extent resulting from the application of this section, is prevented on the date of the enactment of this Act or within one year from such date, then, notwithstanding any other provision of law or rule of law (other than this subsection and other than section 3761 of the Internal Revenue Code or section 3229 of the Revised Statutes, or such section as amended by section 815 of the Revenue Act of 1938, relating to compromises), such overpayment shall be refunded or credited in the same manner as in the case of an income tax erroneously collected under the Revenue Act of 1936, if claim therefore is filed within one year from the date of the enactment of this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 193

NEMOURS CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 17-26) is reported at 91 F. Supp. 859. The opinion of the Court of Appeals (R. 31-37) is reported at 188 F. 2d 745.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1951. (R. 38.) The petition for a writ of certiorari was filed July 18, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the court below properly held that taxpayer's claim for refund, which asserted a claim for relief from undistributed profits tax under Section 26 (f) of the Revenue Act of 1936 and alleged facts insufficient for the granting of relief under Section 26 (c)(3) of that Act, was inadequate to provide the basis for a suit for relief under Section 26 (c) (3).

2. Whether the court below properly held that the term "earnings and profits accumulated after February 28, 1913", as used in Section 26 (f) of the 1936 Act, means accumulated earnings and profits in the federal tax sense, with the result that taxpayer is not entitled to relief under Section 26 (f).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra,* pp. 12-14.

STATEMENT

The facts, as reflected by a record consisting of the pleadings, a stipulation of facts (R. 6-12) and exhibits which were attached to the stipulation and placed in evidence (R. 17, 32), may be summarized as follows:

Nemours Corporation, a Delaware corporation, was organized in 1924 and has its principal office in Wilmington, Delaware. It is and was at all times a personal holding company as defined by the applicable Federal Revenue Acts, holding investments

in securities, real estate, and oil and gas properties. During 1936, the taxable year, its total issued and outstanding stock consisted of 36,172 no par value shares, of which 28,923 shares were held by Paulina duPont Dean and 7,249 shares by her husband, J. Simpson Dean. (R. 7.)

In 1936, the taxable year, the corporation (the taxpayer) sustained a loss of $237,513.63 from the sale of certain securities. Of this amount only $2,000 was allowable as a deduction in computing taxpayer's undistributed net income for purposes of the undistributed profits tax imposed by the Revenue Act of 1936. (R. 9.)

Taxpayer's income tax return for 1936 disclosed an adjusted net income of $361,988.82, later increased by the Commissioner to $362,650.01 on grounds not material here. After deducting from this latter figure the normal income tax thereon of $3,064.12, as well as the credit for dividends paid during the year of $128,410.60, taxpayer's undistributed net income was shown as $231,175.29 and the undistributed profits tax due thereon was $39,044.24, which taxpayer paid. (R. 8-9.)

Section 501 of the Revenue Act of 1942, approved October 21, 1942, retroactively amended the Revenue Act of 1936 to grant relief from undistributed profits tax in certain situations. Relief under the amendments made to Section 26 (c)(3) of the 1936 Act and under Section 26(f), as added to the 1936 Act, was in each instance by way of a credit for a

deficit resulting from a computation involving the use of accumulated earnings and profits and, as to Section 26 (f), also adjusted net income and earnings and profits of the taxable year.

On May 7, 1943, taxpayer filed a claim for refund of undistributed profits tax, stated to be under the authority of Section 501 of the Revenue Act of 1942. In the claim for refund taxpayer alleged that its "adjusted net income" was $359,585.89; that its "accumulated earnings and profits" as of December 31, 1935, were $122,396.62; that its "earnings & profits for year 1936 (income per books)" were $88,673.74; and hence that it was entitled to a "deficit credit" of $148,515.53 under Section 26 (f) of the Revenue Act of 1936 as added by Section 501 of the 1942 Act. The claim for refund was rejected on August 18, 1945. (R. 7-8, 13-15.)

Taxpayer subsequently instituted this suit for refund. Its complaint alleged that taxpayer had a deficit in "accumulated surplus and undivided profits" on December 31, 1935, and was prohibited under Delaware law from paying dividends in 1936 except to the extent of the $128,410.60 actually paid. (R. 3-4.)

The facts relating to a computation of taxpayer's earnings and profits are as follows:

Taxpayer's operations were profitable during the years 1925 to 1928, inclusive. During those years taxpayer declared and paid nontaxable stock dividends in the total amount of $2,228,100, which were

reflected on taxpayer's books by entries transferring that amount from taxpayer's surplus account to its capital account. (R. 11.)

After sustaining substantial losses in 1933 and 1934, taxpayer's accumulated earnings and profits as of December 31, 1935, amounted to $501,467.93 if the non-taxable stock dividends declared and paid in the years 1925 to 1928, inclusive, amounting to $2,228,100, did not reduce its accumulated earnings and profits for federal tax purposes under Section 26 (f) of the Revenue Act of 1936. If the dividends did reduce taxpayer's accumulated earnings and profits, taxpayer had no accumulated earnings and profits as of December 31, 1935, but instead had a deficit in the sum of $1,726,632.07. (R. 11.)

Taxpayer's earnings and profits for the year 1936 were $133,263.45 without considering certain expenditures which taxpayer had not claimed as deductions in its 1936 return and now claims are deductible. The expenditures totalled $15,077.63 and were made on residential property to which taxpayer held title and which was occupied by taxpayer's two stockholders, the Deans, without payment of rent. (R. 9-10.)

The District Court recognized that taxpayer's refund claim sought relief under an "erroneous" section in that it was filed under Section 26 (f) "whereas it should have been filed under § 26(c)(3) of the same Act" (R. 23-24) but held that the form

of the claim for refund was sufficient to support the granting of relief under Section 26 (c)(3), and that on the merits taxpayer is entitled to relief under that section (R. 22-25). The District Court also held that taxpayer is entitled to a deduction for the $15,077.63 it spent in 1936 on the residence occupied by the Deans, taxpayer's stockholders. (R. 25-26.)

On appeal, the Court of Appeals reversed the decision of the District Court, holding that taxpayer is not entitled to relief under Section 26 (f); that relief cannot be granted under Section 26 (c)(3) on a claim for refund based on Section 26 (f); that it was therefore unnecessary to consider the merits of taxpayer's claim for relief under Section 26 (c)(3); and that, since taxpayer cannot recover in this proceeding, the question whether taxpayer was entitled to a deduction in 1936 for expenditures on the residence occupied by the Deans has become a matter of history which cannot be changed. (R. 33-37.)

ARGUMENT

Taxpayer advances three reasons for the granting of the petition. (Pet. 4-5; Br. 5-9.) None of them is sufficient to call for review of the case by this Court.

1. Taxpayer is incorrect in asserting that the decision below conflicts with the decision of this Court

in *United States* v. *Ogilvie Hardware Co.*, 330 U. S. 709. The *Ogilvie* decision interpreted and applied Section 26(c)(3) of the Revenue Act of 1936, as amended by Section 501 of the Revenue Act of 1942 (Appendix, *infra*, p. 12), and did not relate to Section 26 (f) of the 1936 Act, as added by Section 501 of the 1942 Act (Appendix, *infra*, pp. 12-13). Conversely, the opinion below discusses and interprets Section 26 (f) and, because of the holding that taxpayer's claim for refund under Section 26 (f) is insufficient to support recovery under Section 26 (c)(3), does not discuss or apply Section 26 (c)(3). The *Ogilvie* decision is pertinent in connection with an interpretation of Section 26 (f) only because the relief granted in both Section 26 (c)(3) and Section 26 (f) involves accumulated earnings and profits. In the *Ogilvie* case it was held that for the purposes of Section 26 (c)(3) accumulated earnings and profits are to be determined according to state law. In the present case the court below held that for the purposes of Section 26 (f) "earnings and profits accumulated after February 28, 1913" means accumulated earnings and profits in the federal tax sense and, accordingly, that the non-taxable stock dividends paid by taxpayer in 1925-1928, inclusive, did not reduce taxpayer's accumulated earnings and profits. The difference in evils intended to be remedied by the two sections justifies the interpretation placed upon Section 26

(f) by the court below (see R. 34-35) and taxpayer does not contend the contrary.[1] Taxpayer's assertion of conflict with the *Ogilvie* decision amounts only to an assertion that it would be entitled to relief under Section 23 (c)(3) if its right to relief under that section were reached on the merits.

2. Taxpayer erroneously assumes that the court below held that the $15,077.63 taxpayer expended in 1936 on the residence occupied by the Deans constituted earnings and profits of the year 1936 which could be used to pay dividends. What the court below held, in effect, is that the deductibility of the expenditures is a moot question. This is a suit for recovery of 1936 undistributed profits tax. So far as recovery under Section 26 (c)(3) is concerned, the deductibility of the expenditures is immaterial not only because taxpayer is precluded from recovery under that section but because relief under that section is limited to the amount of a deficit in accumulated earnings and profits as of the close of the preceding taxable year, on which taxpayer's expenditures in 1936 would have no bearing. So far as recovery under Section 26 (f) is concerned, taxpayer's right to relief is foreclosed by the correct holding of the court below that taxpayer's accumulated earnings and profits after February 28, 1913, were not reduced by the amount

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[1] As already noted, the District Court thought that Section 26(f) did not support a refund (see R. 23-24, 33).

of the non-taxable stock dividends it paid in the years 1925-1928, inclusive.[2]

3. The court below correctly held that the nature of taxpayer's claim for refund of undistributed profits tax precludes recovery under Section 26 (c)(3). Relief from the undistributed profits tax was granted by Section 501 of the 1942 Act, and under subsection (c) of that section (Appendix, *infra,* p. 12), together with the applicable Treasury Regulations 94, Article 322-3 (Appendix, *infra,* p. 14), the granting of relief to taxpayer was conditioned in the first instance upon the filing of a claim for refund with the Commissioner which set forth in detail each ground upon which refund was claimed and facts sufficient to apprise the Commissioner of the exact basis therefor. Taxpayer's claim for re-

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[2] Section 26(f) grants relief for a deficit credit in the amount by which the adjusted net income exceeds the sum of (1) the earnings and profits accumulated after February 28, 1913, and (2) the earnings and profits of the taxable year. Taxpayer's adjusted net income for 1936 was less than its normal net income, which was $362,650.01. (R. 9.) (See Section 14 (a) of the Revenue Act of 1936.) If the non-taxable stock dividends did not reduce accumulated earnings and profits, as the court below properly held, taxpayer had accumulated earnings and profits as of December 31, 1935, of $501,467.93 (R. 11) and, accordingly, had no deficit credit under Section 26(f), regardless of the amount of its earnings and profits for 1936.

It may be noted that taxpayer does not contend that these expenditures are deductible in computing adjusted net income. Actually, if the expenditures are deductible in computing earnings and profits for 1936 they probably should also be deducted in computing net income for 1936. If so, the amount of the expenditures would cancel out in a Section 26(f) computation.

fund not only claimed a " 'Deficit credit,' Sec. 26 (f) as added by Sec. 501 Revenue Act of 1942 (See computation below)", rather than relief under Section 26 (c)(3), but computed the amount of the claimed credit strictly in accordance with Section 26 (f). (R. 15.)[3] Moreover, contrary to taxpayer's statement (Br. 9) and that of the District Court (R. 24), all of the facts necessary for relief under Section 26(c)(3) were not available in the claim for refund. The facts given in the refund claim consisted principally of those contained in the computation of the "Deficit credit" claimed under Section 26 (f). That computation did not state that taxpayer had a deficit in accumulated earnings and profits, as required for relief under Section 26 (c)(3), but on the contrary stated that taxpayer had accumulated earnings and profits in the amount of $122,396.62. Nor did the claim for refund state that taxpayer was prohibited by state law from paying more dividends than it did in 1936, a condition to the granting of relief under Section 26 (c)(3). The claim for refund neither put the Commissioner on notice that taxpayer was claiming relief under Section 26 (c)(3) nor did it ap-

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[3] The computation listed taxpayer's adjusted net income and what taxpayer considered to be its accumulated earnings and profits as of December 31, 1935, and its earnings and profits for 1936, added the accumulated and current earnings and profits, and subtracted that sum from adjusted net income. The result was a claimed "Deficit credit" in the amount by which adjusted net income exceeded the sum of the accumulated and current earnings and profits. (R. 15) "Deficit credit" is the topic heading of Section 26(f).

prise the Commissioner of facts sufficient to justify or enable him to pass on a claim for relief under Section 26 (c)(3). Accordingly, contrary to taxpayer's asserted belief (Br. 9), the decision below, holding the claim for refund insufficient to support the granting of relief under Section 26 (c)(3), is in full accord with decisions of this Court. See *Real Estate Title Co.* v. *United States*, 309 U.S. 13, 17-18; *Angelus Milling Co.* v. *Commissioner*, 325 U. S. 293.[4]

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Special Assistants to the Attorney General.

AUGUST, 1951.

[4] The cases petitioner cites in support of its position on this point (Br. 9) all involved amendments to the refund claims which were filed before the claims were rejected by the Commissioner. There was no amendment filed here.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 26. CREDITS OF CORPORATIONS.

In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

* * * * *

(c) [as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 501 (a)(2)] *Restrictions on Payment of Dividends.*—

* * * * *

(3) *Deficit corporations.*—In the case of a corporation having a deficit in accumulated earnings and profits as of the close of the preceding taxable year, the amount of such deficit, if the corporation is prohibited by a provision of a law or of an order of a public regulatory body from paying dividends during the existence of a deficit in accumulated earnings and profits, and if such provision was in effect prior to May 1, 1936.

* * * * *

(f) [as added by the Revenue Act of 1942, *supra,* Sec. 501 (a) (3)] Deficit Credit.—The amount by which the adjusted net income exceeds the sum of (1) the earnings and profits accumulated after February 28, 1913, as of the beginning of the taxable year, and (2) the earnings and profits of the taxable year (com-

puted as of the close of the taxable year without diminution by reason of any distributions made during the taxable year). For the purposes of this subsection, earnings and profits of the taxable year shall be computed without diminution by the amount of the tax imposed under section 14, 102, 103, or 351 for such taxable year; and earnings and profits accumulated after February 28, 1913, as of the beginning of the taxable year, shall be diminished on account of the tax under Section 14, 102, 103, or 351 for any previous taxable year only by the amount of such tax as computed under the amendments made by section 501 of the Revenue Act of 1942.

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 501. ADDITIONAL CREDITS FOR UNDISTRIBUTED PROFITS TAX.

* * * * *

(c) *Overpayments.*—If the refund or credit of any overpayment for any taxable year, to the extent resulting from the application of this section, is prevented on the date of the enactment of this Act or within one year from such date, then, notwithstanding any other provision of law or rule of law (other than this subsection and other than section 3761 of the Internal Revenue Code or section 3229 of the Revised Statutes, or such section as amended by section 815 of the Revenue Act of 1938, relating to compromises), such overpayment shall be refunded or credited in the same man-

ner as in the case of an income tax erroneously collected under the Revenue Act of 1936, if claim therefore is filed within one year from the date of the enactment of this Act.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 322-3. *Claims for refund by taxpayers.* —Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. * * *

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